

MEMORANDUM OF LAW

DATE: December 17, 1993

TO: Jack McGrory, City Manager, via Marcia McLatchy,
Director, Park and Recreation Department

FROM: City Attorney

SUBJECT: Proposed Seal Rock Marine Mammal Ecological Reserve

Robin Stribley of this City's Park and Recreation Department has requested me to provide a memorandum of law to be furnished to the State Lands Commission. The memorandum is to address the fact that this office has concluded that the proposed Seal Rock Marine Mammal Ecological Reserve is a legal and appropriate use of a small portion of the tidelands area held in trust by the City of San Diego.

My understanding is that the Coastal Commission approved the Seal Rock ordinance upon several conditions, one of which is: "Prior to issuing a Coastal Development Permit, applicant must submit proof of approval by the State Lands Commission that the project is consistent with applicable tidelands grants and public trust."

The problem apparently arises from the fact that Curtis Fossum, who is senior staff counsel for the Southern California Region for the State Lands Commission, has concluded that the proposed ordinance is legally invalid under the specific provisions of Chapter 937 of the State Statutes of 1931, pursuant to which Chapter certain tidelands were conveyed from the State to the City. A survey of the area included in the 1931 grant has now shown that the Seal Rock area is not part of the tidelands property conveyed to the City in 1931. (See attached plat - Attachment 1.) The Seal Rock property is, in fact, a portion of the vast tidelands area conveyed to the City pursuant to Chapter 688 of the California Statutes of 1933.

With the above as background, I have attached a copy (Attachment 2) of Curtis Fossum's November 15, 1993, letter in which he discusses the various legal issues. I agree with the general statements contained in Mr. Fossum's letter. Beginning at the bottom of page 2 of his letter he identifies the three legal issues involved.

The first issue has been addressed by the California Coastal Commission by its determination that the proposed ordinance complies with the Coastal Act.

The second issue deals with the question of whether the establishment of the proposed Seal Rock Marine Mammal Ecological Reserve is consistent with the public trust doctrine and State law. I agree with Mr. Fossum's statement and discussion to the effect that the City, as the grantee of the fee interest in the tidelands and as trustee, has substantial flexibility in determining what specific tidelands uses should be allowed on the various portions of the granted tidelands. Mr. Fossum concluded that, because of the limited tidelands uses approved in the 1931 Statutes, the proposed ordinance "is an overbroad application of the police powers necessary to accomplish the social good sought to be protected given the alternatives and without both adequate documentation of need and concurrence by legislative amendment of the 1931 statutes."

I do not agree that it is either the function or the right of the State Lands Commission to impose its subjective view as to the variety and extent of various legal tidelands activities determined by the City to be placed on the various specific portions of tidelands granted to the City. However, it appears clear that it is not necessary to address that issue in view of the fact that the area in question was the subject of the 1933 Act rather than the 1931 Act. Please see the attached letter (Attachment 3) signed by Barbara Bamberger which contains a far more extensive discussion of various uses both passive and active legally authorized under the general tidelands trust. Basically, establishing a small preserve for marine mammals is clearly consistent with legal uses of tidelands.

The third issue addressed is whether the proposed ordinance "is consistent with the granting statute." Mr. Fossum was obviously led to believe that the property in question is part of the tidelands conveyed to the City pursuant to the 1931 Statutes. Presumably he will conclude, once it is established to his satisfaction that the property in question is in fact part of the 1933 grant, that the City Council is well within its authority in adopting the subject ordinance. As noted above, and in Ms. Bamberger's letter, such a use of the tidelands seems patently both legal and appropriate under the 1933 grant.

In summary, the setting aside and use of a small portion of tidelands as a marine preserve while at the same time not cutting off any significant amount of access to swimmers, anglers or divers, except as such activities could interfere with the purpose of the preserve, seems totally and indisputably

consistent with the tidelands trust and the City's ordinance.

It is requested that you submit this memorandum to the State Lands Commission and ask that it confirm the fact that the proposed preserve is a legal use of the tidelands.

JOHN W. WITT, City Attorney

By

Harold O. Valderhaug

Chief Deputy City Attorney

HOV:ps:716

Attachments 3

ML-93-110

TOP

TOP